



May 24, 2000

Mr. Tracy A. Pounders
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR2000-2058

Dear Mr. Pounders:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 135947.

The City of Dallas (the "city") received a request for a proposal that was submitted to the city's Employees' Retirement Fund by CPAS Systems, Inc. ("CPAS"). Pursuant to section 552.305 of the Act, the city notified CPAS of the request for the release of its proposal. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). You enclosed CPAS's comments and a copy of its proposal in your request for this letter ruling. CPAS claims that portions of the requested proposal are excepted from public disclosure under sections 552.104 and 552.110 of the Act. We have considered CPAS's comments and have reviewed the responsive information.

Section 552.110 of the Act protects the property interests of private parties by excepting from public disclosure two kinds of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). CPAS contends that portions of its proposal are excepted from disclosure under both components of section 552.110. More specifically, CPAS asserts (1) that its "proprietary development strategy and implementation methodology" constitute trade secrets, and (2) that the calculation of the

pricing structure in its proposal represents confidential commercial or financial information. We will address each of these claims in turn.

The Texas Supreme Court has adopted the definition of “trade secret” from the Restatement of Torts, section 757, which defines a “trade secret” to be:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is the case here, the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the requested information, this office will accept the third party’s claim for exception to disclosure as valid under that aspect of section 552.110 if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See* Open Records Decision No. 552 at 4 (1990).

In support of its contention that portions of its proposal constitute protected trade secrets under section 552.110(a) of the Act, CPAS states:

¹The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Our corporate development strategy and our implementation methodology are proprietary in nature, having been designed and funded internally from 15 years of industry experience. This information is unique to CPAS. Any communication containing part of these trade secrets is marked "Confidential and Proprietary," as was our proposal to the City of Dallas. Due to the nature of the international pension industry, this information is extremely difficult to properly acquire or duplicate. Thus any information of this nature is considered to be of high value within this industry.

Having considered CPAS's arguments and reviewed the information for which it seeks exception under section 552.110, we are not persuaded that the information in question constitutes trade secrets that must be withheld from the public. In our view, the portions of the requested proposal that CPAS seeks to except from release as trade secrets are both temporal and perishable in nature. Thus, they are "simply information as to a single or ephemeral event in the conduct of the business [and not] a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939). Additionally, we do not believe that CPAS has made the requisite *prima facie* case for exception of the information in question under section 552.110(a). We therefore conclude that the information that CPAS seeks to protect under the trade secret component of section 552.110 is not excepted from disclosure.

CPAS also contends that portions of its proposal are excepted from disclosure under the commercial or financial information component of section 552.110, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, and not mere conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In support of its claim under section 552.110(b), CPAS states:

In an industry where all business is awarded as a result of a formal competitive review, the pricing structure and the logic that is contained within it becomes a key competitive tool. We operate in such an industry, and to disclose our price listed in the proposal to a competitor who lost the competition will give undue advantage to the competitor and damage CPAS's ability to compete in the future.

CPAS further explains that the requestor, Levi, Ray & Shoup, Inc. ("LRS") unsuccessfully competed with CPAS for the business to which the latter's proposal pertains and that LRS also is vying with CPAS for other projects. CPAS asserts that if its competitor gains access to its pricing information, LRS "will have an opportunity to mirror [its] proprietary business process logic in order to appear to be able to compete economically." Therefore, CPAS

contends, “the disclosure of our pricing list in an actively competitive environment will cause substantial competitive harm to CPAS[.]”

As a general rule, information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not excepted from disclosure under section 552.110. *See* Open Records Decision No. 319 at 3 (1982). Pricing proposals are entitled to protection only during the bid submission process. *Id.* Having considered CPAS’s arguments and reviewed the pricing information that it asserts should be withheld, we conclude that CPAS has not made a persuasive factual or evidentiary showing that release of the pricing information that it submitted to the city would necessarily subject CPAS to substantial competitive harm in connection with any other prospective business opportunity. Accordingly, we conclude that the pricing information in CPAS’s proposal may not be withheld from disclosure under section 552.110(b). *See also* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative).

In summary, CPAS has not demonstrated that any of the information that it claims should be withheld from the public is excepted from disclosure under either component of section 552.110 of the Act.² Therefore, the requested proposal must be released in its entirety. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

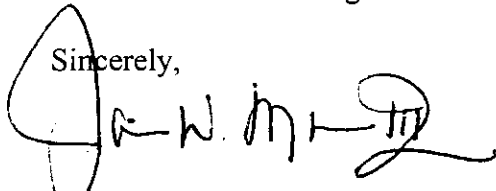
²We note that CPAS concludes its comments with a reference to section 552.104 of the Act and Open Records Decision No. 593 (1991). Section 552.104 protects the interests of governmental bodies, not those of private parties submitting information to the government, and is not applicable once the bidding process has been completed. *See* Open Records Decision Nos. 592 at 8 (1991), 541 at 5 (1990).

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is written in a cursive, flowing style with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 135947

Encl. Submitted documents

cc: Mr. John Katalinich
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